U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 21Jun2002

CASE NO.: 2001-LHC-2528

OWCP NO.: 07-144686

IN THE MATTER OF

JOSEPH ANDERSON,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer,

APPEARANCES:

DAVID C. FRAZIER, ESQ.
On behalf of the Claimant

DONALD P. MOORE, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Joseph Anderson (Claimant) against Ingalls Shipbuilding, Inc. (Employer), a self-insured corporation.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Gulfport, Mississippi, on March 8, 2002. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

[1] References to the transcript and exhibits are as follows: Transcript - TR. ___; Claimant's Exhibits - CX.___, p.___; Employer's Exhibits - EX. ___, p. ___; Joint Exhibits - JE. ___.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2001-LHC-2528 (JE-1):

1. Jurisdiction of this claim exists under the LHWCA, 33 U.S.C. § 901 et seq.

2. Date of alleged injury/accident: May 15, 1997.

3. Alleged injury occurred within the course and scope of the employment: Yes.

4. Employer/Employee relationship existed at the time of the alleged accident: Yes.

5. Employer was timely advised of the injury.

6. The Notice of Controversion (LS-207) was timely filed.

7. Average weekly wage at the time of the injury: $574.30.

8. Benefits paid:
   (a) Temporary total disability: 6/30/97-7/25/97 and 2/27/98-3/24/00.
   Total paid: $48,240.36.

   (b) Permanent partial disability: 3/21/00 and continuing.
   Total paid: $22,778.02.
   Based on a wage earning capacity of $120.18 per week.

   (c) Total medicals paid to date: $61,328.77.

9. Date of maximum medical improvement: January 11, 2000.

II. ISSUES

1. Nature and Extent - suitable alternative employment
2. 8(f) Relief.
3. Credit for compensation and wages paid.
4. Attorney's fees.

III. STATEMENT OF THE CASE

Summary

Claimant is a 57 year old man who injured his back at work. He was already on permanent work restrictions for knee injuries. Claimant's doctors released him to work with sedentary work restrictions after reaching MMI for the back injury. Claimant alleges that he is totally disabled. I must determine the extent of Claimant's injuries.

Facts

Claimant's Testimony

Claimant is a 57 year old man from Laurel, Mississippi, and has been married for thirty eight (38) years. (TR.9-10,26,46). His wife and he have three grown sons. (TR.10). Claimant has a twelfth grade education and worked for Employer as a ship fitter for approximately thirty years (30) prior to being injured on May 15, 1997. (TR.13). During the 1970s, Claimant worked several part-time jobs for a short period of time. He worked for a pest control company and Walker Towing. (TR.45).

Claimant had previously injured his knees while working for Employer. (TR.10). Claimant's back injury resulted from a series of accidents. On March 20, 1997, Claimant fell off a bucket that he was sitting on and struck his lumbar region on a T-beam. He had been working on the floor as he sat on the bucket. (TR.11). He injured his lower back again in April, 1997, when his back gave out as he was holding a jig pin being installed in a boat hull. (TR.11-12). Claimant initially did not miss any work for either injury. (TR.11-13). On May 15, 1997, Claimant was stepping off of a platform when his back gave out and he fell to his knees. He was carrying his tools and a shoulder strap. (TR.13).

Claimant was taken to Employer's medical facility where they placed heat on his back. He continued to work for six (6) or eight (8) months for Employer. (TR.14). Claimant worked on small projects at another location. His condition declined during this period. Back pain was continuous and the left leg developed problems. Claimant was being treated by Dr. Drake, an orthopedist in Ocean Springs, Mississippi. (TR.15). Claimant subsequently sought treatment with Dr. McCloskey, a neurosurgeon in Pascagoula, Mississippi. (TR.16). Dr. McCloskey performed lower back surgery on Claimant in June, 1998. (TR.17-18). Claimant was sent to physical therapy after this initial surgery. (TR.21). Claimant's condition worsened after surgery with more stiffness and pain. He did not return to work thereafter.[2] (TR.18). Dr. McCloskey performed surgery again in May, 1999.

[2]The record does not clearly show the last day Claimant worked. Employer initiated disability payments on February 27, 1998. (EX.8; JE-1). Claimant was working when he initially saw Dr. McCloskey on September 9, 1997, but was not working by May 7, 1998. (CX.11, p.225,231). By then he had not been working "for several months." (EX.11, p.203). I find that Claimant last worked on February 26, 1998.

(TR.18-19). This surgery was interrupted by complications. (TR.19). He was sent to a rehabilitation doctor after this surgery. (TR.21).

Claimant initiated treatment with Dr. Laseter approximately a year and a half prior to trial. (TR.21). Dr. Laseter is a pain management practitioner in Pascagoula. (TR.21). He has prescribed several medications, including Oxycontin and Celebrex. (TR.22). No doctor has released Claimant to return to work since the last surgery. (TR.22). He has applied for and receives social security benefits. He was determined to be permanently disabled and unable to work pursuant to the Social Security Disability Act. (TR.23).

Claimant reached MMI in January, 2000, and received a list of potential employers. He submitted written applications with two potential employers but received no job offers. (TR. 24-25,40,42). Claimant testified that his wife drove him to apply for jobs because he would get motion sickness from driving. (TR.25). At trial, he complained of back, left hip and left leg pain. (TR.26).

Claimant used to hunt and fish before his back injury. He has been unable to do either since the injury. (TR.28). Dr. Laseter continues to prescribe Oxycontin for pain and Celebrex, a muscle relaxer. (TR.22). Claimant now sleeps twenty hours per day. (TR.33). Claimant often dozes off, even when people are speaking to him, because his medication makes him groggy. (TR.27,31-32). He generally cannot get to sleep until two or three o'clock in the morning due to his medication. He frequently wakes up between four and six o'clock in the morning before laying back down. (TR.27). For exercise, he walks in the yard. The distance he can walk varies daily. (TR.26). He occasionally accompanies his wife to the store. However, he often has to go outside and sit down after a while. He helps with vacuuming and washing dishes when he can. Bending his back hurts. (Tr.29). Dr. Laseter prescribed a mechanical device to help Claimant in the house. This device has not been provided yet. (TR.30). Claimant opined that even if he could find a job where he worked only six hours per day for five days per week, he could not perform it due to pain. (TR.38).

Testimony of Pauline Anderson

Claimant and Mrs. Anderson have been married for 38 years. According to Mrs. Anderson, Claimant worked even when he was sick and received attendance bonuses before the May 15, 1997 accident. (TR.47). Now, Claimant sleeps until 10 A.M. or noon. He can no longer help with housework and no longer works in the yard. If he does housework, it hurts him afterwards and he ends up on the couch. (TR.48). The frequency Claimant goes to the store with Mrs. Anderson has decreased with time. (TR.49). When he goes to the store, Claimant leaves Mrs. Anderson before the shopping is completed and goes out to the car to rest. (TR.49-50).

Claimant occasionally dozes off when Mrs. Anderson is speaking to him. Mrs. Anderson testified that Claimant does not fall asleep during conversations. Claimant does not drive very much. (TR.51). When traveling long distance in the car, Claimant needs to stop several times to move

around. (TR.51-52). Upon returning home, Claimant lies on the couch in an effort to be comfortable. (TR.52).

Mrs. Anderson opined that Claimant could not work for six hours per day for five days per week because he cannot stand or sit for very long. Mrs. Anderson also reasoned that Claimant cannot work because he dozes off. (TR.52).

Medical Evidence

Dr. Drake

Records of Dr. Drake's treatment from October, 1995, for a knee injury to September 5, 1997, were entered at trial. (CX.7). Dr. Drake first noted back problems on March 24, 1997. He diagnosed degenerative disc disease in the lumbar spine and continued Claimant on temporary restrictions that he had already assigned for the knee injury. (CX.7, p.6-7). These restrictions were first assigned on July 19, 1996, and included use of a shuttle van from Employer's parking lot, limited squatting and climbing and no more than four hours of standing or walking during an eight hour work day. (CX.7, p.8).

An MRI taken on May 16, 1997, showed bulging at L4-5 with associated bilateral facet joint hypertrophy resulting in relative narrowing of the neuroforamen bilaterally. It also showed mild posterior disc bulges at L3-4 and L2-3. (CX.7, p.30). On June 2, 1997, Dr. Drake diagnosed spinal stenosis and degenerative disc disease. (CX.7, p.4). In July, 1997, Dr. Drake removed Claimant from all work in order to send him to physical therapy because his condition was rapidly declining. (CX.7, p.3-4). He returned Claimant to work with the same restrictions on July 25, 1997. (CX.7, p.3). By September 5, 1997, Claimant's lumbar pain was worse again and Dr. Drake agreed with his desire to go to Dr. McCloskey for treatment. (CX.7, p.2).

Dr. McCloskey

When Dr. McCloskey first saw Claimant on September 9, 1997, Claimant complained of low back and anterolateral left thigh pain along with chronic knee problems. By that time, Claimant could only walk short distances. Dr. McCloskey observed limited back motion and some knee tenderness. (CX.11, p.263). He suspected symptomatic lumbar canal stenosis with radiculopathy in the left leg. (CX.11, p.263-264).

A May 15, 1998 MRI showed multilevel degenerative disc disease with bulging disks at L2-3, L3-4, L4-5 and L5-S1. It also showed moderately severe spinal stenosis at L3-4 and L4-5. (CX.11, p.198; CX.12, p.61). Dr. McCloskey performed a decompressive hemilaminectomy at L4-5 on June 15, 1998. (CX.11, p.191; CX.12, p.65,72). A September 1, 1998 MRI showed no complications from the hemilaminectomy and moderate but uncomplicated chronic degenerative disease at L5. (CX.12, p.133). The June 15, 1998 surgery did not help, however, and Claimant continued to experience pain in the lower back and left leg. On May 28, 1999, Dr. McCloskey performed a

bilateral decompression and cage fusion at L3-4. (CX.11, p.241; CX.12, p.136,143).[3] A biopsy of tissue taken from L2-L3 and L3-L4 showed apparently degenerative fibrocartilage consistent with herniated nucleus pulposus. (CX.11, p.252; CX.12, p.190). A radiograph taken right after surgery showed no apparent postoperative complication. (CX.12, p.196).

On March 15, 1999, Michael Rogers, physical therapist, observed that Claimant's symptoms suggested lumbar instability. (CX.11, p.86). He assessed that Claimant had reached "a plateau from physical therapy". He opined that, although therapy helped alleviate symptoms, it did little to enhance his functional capacity. (CX.11, p.87).

Surgery performed on May 28, 1999 did not help Claimant either. Dr. McCloskey agreed with Dr. Robert Monolakas who established MMI on January 11, 2000. He also agreed with the permanent restrictions Dr. Monolakas established. These include no more than one to two hours of standing, walking, sitting or driving at a time; occasional bending and reaching; and no twisting, climbing or prolonged walking in parking lots to entrances. Claimant must also be allowed to change from sitting to standing frequently. Claimant may use his hands and feet repetitively. (CX.11, p.119; EX.17, p.3). In a March 27, 2000 letter to Claimant's attorney, Dr. McCloskey opined that Claimant could perform sedentary type work and that he had a 10% physical impairment to the body as a whole. (CX.11, p.43).

On April 6, 2000, Dr. McCloskey responded to Employer's questions confirming that Claimant's pre-existing 8% total body disability from his knee injury had combined with his 10% total body disability from his back injury to leave him with an 18% total body disability. (CX.11, p.39). Dr. McCloskey approved six positions presented to him by Employer on March 3, 2000. (CX.11, p.31-32).

At the last follow up visit contained in the record, Claimant continued to complain of low back and left leg pain. Claimant also complained of neck pain and pain radiating down his right arm with numbness and tingling in his right hand. Dr. McCloskey diagnosed post laminectomy syndrome, neck pain and right upper extremity radicular pain. (CX.11, p.11). He had no evidence to relate the neck pain to his work related low back injury. (CX.11, p.12).

Dr. McBroom

When Dr. McBroom saw Claimant on March 11, 1998, he had not seen Claimant since 1996. Claimant was complaining of left leg pain and an "electric like" pain in his back during intercourse. Claimant was developing depression and had become suicidal. (CX.5, p.27).

[3]A possible fusion at L2-3 had also been planned. Claimant developed heart abnormalities and the surgery was stopped before the L2-3 fusion could be performed. (CX.11, p.241;CX.12, p.143). Dr. Jaswinder Kandola was consulted about this problem on the date of surgery. (CX.12, p.145-146).

On August 26, 1998, Dr. McBroom noted that Claimant's hypertension was under fairly good control. Claimant stated that back surgery performed by Dr. McCloskey had not helped and his back had not improved. Dr. McCloskey had given Claimant Neurotin. This "dulled it some" but Claimant's left leg began dragging every time he tried to walk or do any work. (CX.5, p.29).

When Dr. McBroom saw Claimant on November 18, 1998, Claimant was supposed to have seen Dr. McCloskey, but two appointments had been canceled. Despite a previous MRI that was normal, according to Dr. McCloskey, Dr. McBroom opined that Claimant's continued elevated blood pressure was due to his persistent back pain. (CX.5, p.29).

In August, 1999, Dr. McBroom placed Claimant on a low cholesterol diet after he had experienced an abnormal EKG during the June, 1999 back surgery. (CX.5, p.31). By October 8, 1999, Claimant's back pain had considerably worsened. (CX.5, p.33). On October 22, 1999, Dr. McBroom credited Ziac for lessening Claimant's pain. (CX.5, p.34). Dr. McBroom's last treatment in the record was on November 7, 2001. (CX.5, p.38). In the interim Claimant continued to have back pain. (CX.5, p.35,37).

Dr. Faircloth

Dr. Brent Faircloth is a neurosurgeon who examined Claimant on April 26, 1999, for his back and left hip pain. Dr. Faircloth observed degenerative disc disease at L2-3, 3-4 and L5-S1 in Claimant's MRIs. He observed no neural impingement. MRIs taken prior to surgery showed lateral recess stenosis at L4-5. (EX.18, p.1).

Upon physical examination, Dr. Faircloth observed a full range of motion for the cervical spine, but the lumbar spine was limited to 45 degree flection which caused midline back pain. Slight extension caused severe back pain. (EX.18, p.3).

Dr. Faircloth diagnosed degenerative disc disease and evidence of mechanical instability at L2-3 and L3-4 on discography which reproduced pain. He agreed with Dr. McCloskey's proposed spine stabilization at L2-3 and L3-4. (EX.18, p.3).

Dr. Laseter

Dr. McCloskey referred Claimant to Dr. Jeffrey Laseter, a doctor at the Mississippi Pain Center in Pascagoula. (CX.9, p.9). He first saw Claimant on June 15, 2000. (CX.9, p.10). At that time, Claimant attributed 75% of his pain to his back and 25% to his leg. Dr. Laseter prescribed Oxycontin and Baclofen and continued Claimant on Celebrex and Paxil. (CX.9, P.9). His diagnosis was post laminectomy syndrome. (CX.9, p.8,11).

On July 10, 2000, Dr. Laseter confirmed Claimant's previously assigned permanent restrictions to sedentary work. These restrictions include occasional bending, occasional reaching, no ladder climbing, no twisting or climbing, occasional pushing or pulling, no more than one to two hours of standing or walking at a time, no prolonged walking from parking lot entrances and no more than one to two hours of sitting or driving at a time. Claimant must also be allowed to change body position frequently. (CX.9, p.8).

By an August 11, 2000 visit, Claimant was complaining of continued muscle spasms and that he was getting sleepy throughout the day. He had stopped taking Baclofen because it caused nausea. Upon physical examination, Claimant rated his pain at a 7/10 level. He had decreased range of motion in flexion and extension of his lumbar spine. He also had diffuse tenderness in his lumbar paraspinous musculature. Claimant was taking the following medications: Celebrex, Paxil, Ziac, Prinivil, Verapamil, Allopurinol, and Oxycontin. Dr. Laseter also prescribed Soma. (CX.9, p.7).

On November 13, 2000, Claimant was complaining of pain down his right arm and his third and fourth finger as well as his back and leg pain. Physical examination showed 5/5 motor strength bilaterally in the upper and lower extremities. Sensory was intact to light touch and pinprick. Reflexes were 1+ bilaterally in the biceps, triceps, brachioradialis, patella and achilles. Phalen's test, Tenel's sign, straight leg raising test and Spurling's maneuver were all negative. Radial pulses were positive bilaterally. (CX.9, p.6). Claimant was having trouble sleeping at night by February 13, 2001. (CX.9, p.5). By May 18, 2001, Claimant reported that his quality of life had improved but that his pain became quite severe when he did not take his medicine. He continued to have decreased range of motion of his lumbar spine and flexion and extension. (CX.9, p.4).

When Dr. Laseter last saw Claimant on December 14, 2001, his back and leg pain persisted. Claimant continued to have problems sleeping at night and experienced increased morning pain. He also continued to report feeling sedated during the day. Physical examination revealed a soft and non-distended abdomen. Motor and sensory changes remained unchanged. Claimant had a lightly antalgic gait and he had decreased range of motion, flexion and extension of his lumbar spine. Dr. Laseter continued to diagnose post laminectomy syndrome lumbar as well as a displaced disk at C5-6. (CX.9, p.1).

Vocational Evidence

Tom Stewart, a certified rehabilitation counselor, evaluated Claimant for vocational rehabilitation for Employer. He interviewed Claimant on February 23, 2000, and performed labor market surveys on February 23, 2000, March 1, 2000, October 4, 2000, and November 14, 2001. (EX.19, p.1,3,8). Drs. Laseter and McCloskey approved the positions at Coastal Energy, Days Inn Motel and Swetman Security Services identified in the March 1, 2000 survey. They also approved a position at Pinkerton Security that was not in the survey but was presented to them. The G.C. Security position was provided to the doctors but was not presented for approval. (EX.19, p.6-7, 16-17).

Despite stating that he understood his permanent work restrictions, Claimant stated at the interview that he was not aware of any jobs he could handle, as he had spent most of his work life with Employer and had not been exposed to other jobs outside the shipbuilding industry. Claimant noted that he would look at lighter jobs, but he doubted he could resume full-time work activity at that time. (EX.19, p.8). Stewart opined that Claimant's residual employability was limited. He emphasized that any work would have to be sedentary and unskilled and that any prospective employer would have to afford Claimant the opportunity of sitting for the majority of the time, with alternate standing and walking as needed. (EX.19, p.12).

Stewart used the following restrictions in performing his labor market surveys: standing/walking no more than 1-2 hours at a time; sitting and driving 1-2 hours at a time; hands and feet use repetitively; may occasionally bend; never twist, climb; reach occasionally; no prolonged walking from parking lot to entrances; permit frequent body position changes during sitting/standing periods. (EX.19, p.9).

In a survey conducted on February 29, 2000, and March 1, 2000, Stewart identified four possible positions. Coastal Energy, Inc., a gas distributor, was hiring fuel booth cashiers at various locations, including one in Ocean Springs, Mississippi. The position paid $5.25 per hour for 20-40 hours per week. Workers could sit or stand as needed. Duties included taking money for fuel and other store item purchases, such as candy and cigarettes and occasionally included emptying trash and cleaning the sales booth windows. (EX.19, p.12-13).

Days Inn Motel in Moss Point, Mississippi, was hiring a front desk clerk and paying $5.15 per hour for 32-40 hours per week. Duties were classified as sedentary-light and included greeting and checking guests in and out, assigning rooms, issuing keys, taking payments and making reservations. (EX19, p.13).

Swetman Security Services in Pascagoula, Mississippi, was hiring a gate guard at $5.50 per hour for 40 hours per week. Duties were classified as sedentary-light and included sitting and/or standing at a plant gate, checking vehicles and personnel in and out as needed. (EX.19, p.13).

G.C. Security, Inc., in Gulfport, Mississippi, was hiring a part-time night watchman for a motel at $5.50 per hour for 33 hours within two-week periods. This position would likely progress to a 7 days on and 7 days off schedule, involving more than 33 hours per two-week period. Duties included sitting and observing for unusual activity around the motel and walking a 5 minute route around the motel every 30 minutes. The night watchman could sit in his car or in the motel lobby the remainder of the time. (EX.19, p.13).

Stewart conducted a follow-up survey dated October 4, 2000. (EX.19, p.3). He identified four more positions in this survey. (EX.19, p.4-5). The Mississippi Department of Transportation was accepting applications for two bridge tender positions that paid $1034 per month with benefits for 40 hours per week. Shifts varied. The bridges required round-the-clock servicing. Duties involved opening and closing the draw bridge for boat traffic, operating a mobile radio, marine radio and telephone, and visually observing and monitoring river traffic. This position was classified as sedentary. (EX.19, p.4).

Professional Security Services had a security guard position at a college campus in Gulfport paying $6 per hour for 30-40 hours per week on the night shift. Duties included patrolling the campus observing for open doors, fire hazards and trespassers. Rounds would be done using a golf cart and would take 5-10 minutes each hour. (EX.19, p.4).

Coastal Energy, Inc., was hiring three booth cashiers in Ocean Springs, Gulfport and D'Iberville, Mississippi. The positions paid $6.15 per hour for 20-40 hours per week, depending on staffing requirements. Duties included sitting or standing in an island booth taking money for purchases, emptying the trash and cleaning the windows of the booth. (EX.19, p.4).

Days Inn Motel in Moss Point was hiring a front desk clerk at $5.15 per hour for 32 -40 hours per week. Duties included greeting and checking guests in and out, assigning rooms, issuing keys, taking payments, making reservations and completing shift reports at the end of shifts. The position was classified as sedentary-light in terms of physical demands. (EX.19, p.5).

Stewart performed a final follow up survey dated November 14, 2001, to identify positions in the Laurel, Mississippi area. As no positions fitting Claimant's restrictions were available in Laurel, Stewart identified positions in the Hattiesburg, Mississippi area, approximately 25 to 30 miles away. Albertson Express was hiring full and part-time fuel booth attendants at $6 per hour. Duties involved sitting or standing, as needed, taking payments for purchases, occasionally cleaning booth windows and fuel pumps with window spray and completing a shift report of monies received. (EX.19, p.1).

Professional Security Services was hiring a security guard to work in a guard shack at the entrance to a golfing community near Hattiesburg. The position paid $6 per hour for 40 hour weeks. Duties included sitting at the guard shack greeting in-coming and out-going residents and visitors to the community and occasionally driving around the development to look for any problems or safety issues. (EX.19, p.2).

Days Inn Motel was hiring a front desk clerk-night auditor at $5.50 per hour for 40 hours per week during the 11 p.m. to 7 a.m. shift. Duties included simple bookkeeping in balancing the daily receipts and expenditures, checking guests in and out, taking reservations and answering the phone. This was a sedentary position. (EX.19, p.2).

Professional Security Services was hiring another security guard to work at the Sunbeam Plant at $6 per hour for 32 - 40 hours per week. Duties included sitting at plant entrances checking employees' ID badges, walking around inside the plant once every two hours to check doors and administrative offices for unauthorized persons, fire hazards and other safety concerns. The position involved more sitting than standing and was considered sedentary. (EX.19, p.2).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), aff'g, 990 F.2d 730 (3rd Cir. 1993).

NATURE AND EXTENT

Causation is not disputed. Having established a work-related injury, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 2741(1989); Trask, at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395 (1981). The parties have stipulated that Claimant reached MMI on January 11, 2000.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the LHWCA means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). In order for Claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 117 S.Ct. 1953, 1955 (1997). A Claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A Claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which Employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corps., 25 BRBS 128 (1991).

Employer stipulated in its brief and I find that Claimant cannot return to his previous employment. Therefore, Claimant has successfully established a prima facie case for total disability.

SUITABLE ALTERNATIVE EMPLOYMENT

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the Claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g, 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir 1993), cert denied, 114 S.Ct. 1539 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT)(4th Cir. 1984), rev'g, 13 BRBS 53 (1980); Turner, 661 F.2d at 1043, 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691 (1980); Pilkington V. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Industries v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

Employer provided four (4) labor market surveys conducted by Stewart in which twelve (12) different positions were identified. In conducting these surveys, Stewart used the restrictions assigned by Claimant's doctors, which were: standing/walking 1-2 hours at a time limit; sitting and driving 1-2 hours at a time; hands and feet use repetitively; may occasionally bend; never twist, climb; reach occasionally; no prolonged walking from parking lot to entrances; permit frequent body position changes during sitting/standing periods. Stewart opined that Claimant's residual employability was limited and emphasized that any position would have to be sedentary and unskilled.

At trial, Claimant testified that the medication he is on makes him groggy and has adjusted his sleeping patterns. He testified that he is taking Oxycontin and Celebrex. Dr. Laseter's records show that Claimant was also taking Paxil, Ziac, Prinivil, Verapamil, Allopurinol and Soma in August, 2000. Claimant testified that his ability to be active has declined. Whereas he used to be an avid hunter and fisher, he is no longer able to do either. He occasionally accompanies his wife to the store but has to leave the store before his wife is finished in order to sit down. His wife testified that he dozes off during conversations. I found both Claimant and his wife to be credible witnesses at trial. Considering their testimony of Claimant's sleeping patterns and his pain complaints as well as the considerable medication he is taking, I do not see how Claimant could perform any work. Therefore, I find that none of the positions Employer identified are suitable alternative employment and that Claimant is totally and permanently disabled.

SECTION 8(f)

Employer requests relief from the Special Fund pursuant to Section 8(f) of the Act. Under the "aggravation rule", an employer is usually liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or condition. Strachen Shipping Co. v. Nash, 782 F.2d 513, 517 (5th Cir. 1986)(*en banc*); Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 508 (2nd Cir. 1990). However, if an employer can prove entitlement to Section 8(f) relief, the Special Fund may assume responsibility for part of the employer's obligation. To obtain Section 8(f) relief when an employee is totally disabled, an employer must show that: 1) the employee had a pre-existing permanent partial disability; 2) this disability was manifest to the employer prior to the subsequent injury; and 3) the subsequent injury alone would not have caused the claimant's total permanent disability. Director, OWCP v. General Dynamics Corp., 982 F2d 790, 793 (2nd Cir. 1992); see Brown and Root, Inc. v. Sain, 162 F.3d 813 (4th Cir. 1998) (previously existing permanent partial disability must contribute to employee's death). When an employee is permanently partially disabled and not totally disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1), cited in Two R Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990). I have found that Claimant is permanently totally disabled.

The purpose of Section 8(f) is to prevent employer discrimination in the hiring of handicapped workers, and to encourage the retention of handicapped workers. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); General Dynamics Corp, 982 F.2d at 793. It is also well settled that the provisions of Section 8(f) are to be construed liberally in favor of the employer. Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Johnson v. Bender Ship Repair, Inc., 8 BRBS 635 (1978).

A pre-existing permanent partial disability can be (1) a scheduled loss under Section 8(c) of the Act; (2) an economic disability arising out of a physical infirmity; or (3) a serious physical disability which would motivate a cautious employer to dismiss an employee because of a greatly increased risk of an employment-related accident and compensation liability. C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977); General Dynamics Corp., 982 F.2d at 795; Cononetz v. Pacific Fisherman, Inc., 11 BRBS 175 (1979); Johnson v. Brady-Hamilton Stevedoring Co., 11 BRBS 427 (1979). Although the mere fact of a past injury does not establish a disability, the existence of a serious and lasting disability does. Foundation Constructors v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991).

The second requirement for 8(f) relief is that the pre-existing work-related injury is manifest to the employer. Sealand Terminals, Inc. v. Gasparic, 7 F.3d 321, 323 (2nd Cir. 1993). This requirement is not a statutory part of Section 8(f) but has been added by the courts. American Mut. Ins. Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). A pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury. Director, OWCP

v. General Dynamics Corp., 980 F.2d 74, 80-83 (1st Cir. 1992); Lowry v. Williamette Iron and Steel Co., 11 BRBS 372 (1979). The existence or availability of records showing the impairment is sufficient notice to meet the manifest requirement. Director v. Universal Terminal and Stevedoring Corp., 575 F.2d 452 (3rd Cir. 1978); Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989); Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984). Further, virtually any objective evidence of pre-existing permanent partial disability, even evidence which does not indicate the permanence or severity of the disability, will satisfy the manifest requirement, since it could alert the employer to the existence of a permanent partial disability. Lowry, 11 BRBS 372; Director, OWCP v. Berkstresser, 921 F.2d 306, 309 (D.C. Cir. 1990).

Lastly, an employer may obtain 8(f) relief where the subsequent injury alone would not have caused the employee's total permanent disability. General Dynamics Corp., 982 F.2d at 793. Put differently, relief may be obtained where the combination of the worker's pre-existing disability or medical condition and his last employment-related injury result in a greater permanent disability than the worker would have incurred from the last injury alone. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144 (9th Cir. 1991); Director, OWCP v. Newport News and Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). The key element is whether the work-related injury, when coupled with the prior disability, materially and substantially aggravated and contributed to the employee's permanent disability.

Claimant injured his back on March 20 and in April, 1997. It finally gave out on him on May 15, 1997, the stipulated date of injury. Claimant was already working with work restrictions for pre-existing knee injuries. Therefore, Employer has satisfied the first requirement for Special Fund relief. Claimant's leg injuries occurred while he was working for Employer and he continued to work for Employer with the restrictions for knee injures. Therefore, I find that the knee injuries were manifest to Employer before Claimant injured his back. Employer has satisfied the second requirement for Special Fund relief. On April 6, 2000, Dr. McCloskey opined that Claimant's pre-existing knee injuries had combined with his back injuries to leave him with an 18% total body disability. Based on Dr. McCloskey's opinion that both injuries contributed to his current condition, I find that Employer has satisfied the third requirement for Special Fund relief. On May 11, 2001, the Office of Workers' Compensation Programs and the National Office concurred that Employer was entitled to Special Fund relief. This conclusion assumed that Claimant would accept compensation for permanent partial disability.[4] I have found Claimant to be totally disabled because of these pain complaints and the resulting heavy medication he is taking for them. Based on Dr. McCloskey's opinion, I find that Claimant's back injury has combined with his pre-existing knee injuries to make him totally and permanently disabled. Therefore, Employer is entitled to Special Fund relief under Section 8(f) of the Act.

[4](EX.13, p.1).

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1) Employer shall pay Claimant compensation for temporary total disability from February 27, 1998, until January 11, 2000, based on an average weekly wage of $574.30.

2) Employer shall pay Claimant permanent total disability based on an average weekly wage of $574.30 from January 12, 2000 and continuing for a total of 104 weeks from January 11, 2000.

3) Employer's request for 8(f) relief is hereby granted. Following cessation of payments by Employer continuing benefits shall be paid by the Special fund pursuant to Section 8(f) of the Act.

4) Employer shall receive a credit for benefits already paid pursuant to Section 14(j) of the Act.

5) Counsel for Claimant, within 30 days of receipt of this Order, shall submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have 20 days to respond with objections thereto.

6) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

So ORDERED this 21st day of June, 2002, at Metairie, Louisiana

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LARRY W. PRICE
Administrative Law Judge

LWP:bab